No. 05-

Supreme Court, U.S.
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Supreme Court of the United States

TRUMBALL INVESTMENTS LIMITED I; TRUMBALL INVESTMENTS LIMITED II; MOLINA INTERNATIONAL LIMITED; IVYWILD INVESTMENT CORPORATION; CORTLAND OVERSEAS LIMITED; and TERREL OVERSEAS INC, INCORPORATED,

Petitioners,

v.

WACHOVIA BANK, N.A.,
formerly known as First Union National Bank

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is the right to a jury trial guaranteed by the Seventh Amendment to the Constitution of the United States violated when a district court improperly determines questions of fact in ruling upon a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6)?

II. Did the District Court err in determining that an addenda to a contract changing a key word from "may" to "shall" and executed on the ***same day*** as the original contract had no effect on the substantive requirements of the contract?

III. Did the District Court err in finding that a contractual provision providing that First Union "***shall*** in its discretion, follow and rely on any instruction given by Humayun H. Baigmohamed, given via facsimile transmission, or given orally, by telephone, that Agent believes to be genuine," (emphasis added), permitted First Union to refuse to comply with oral trading instructions given by Mr. Baigmohamed?

PARTIES TO THE PROCEEDING

Petitioners are Trumball Investments Limited I; Trumball Investments Limited II; Molina International Limited; Ivywild Investment Corporation; Cortland Overseas Limited; and Terrel Overseas Inc., Incorporated.

Respondent is Wachovia Bank, N.A.

CORPORATE DISCLOSURE STATEMENT

Petitioners Trumball Investments Ltd. I, Trumball Investments Ltd. II, Molina International, Ltd., Ivywild Investment Corp., Cortland Overseas, Ltd., and Terrel Overseas, Inc. have no parent corporations, and no publicly held corporation owns 10% or more of the stock of any Petitioner.

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The opinion of the Court of Appeals (Pet. App. 1a – 12a) is reported at 436 F.3d 443 (4th Cir. 2006). The District Court's opinion is unreported and reprinted in full in the Appendix at Pet. App. 13a – 23a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgement on February 3, 2006, and a petition for *en bànc* review was denied on March 6, 2006. Pet. App. 24a – 25a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The relevant constitutional provision involved is:

U.S. Const. Am. VII

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This lawsuit arises out of Respondent's failure to execute legitimate trades as ordered by Petitioners' authorized agent, Humayun Baigmohamed, in breach of a contract between the parties. Plaintiffs Trumball Investments Ltd. I, Trumball Investments Ltd. II, Molina International, Ltd., Ivywild

Investment Corp., Cortland Overseas, Ltd., and Terrel Overseas, Inc. (hereinafter collectively referred to as "Petitioners") all held investment accounts (hereinafter "Accounts") with First Union National Bank ("First Union"), predecessor in interest to Respondent Wachovia Bank. Pet. App. 2a. Humayun Baigmohamed ("Baigmohamed") acted as an explicitly authorized agent for each Petitioner company with respect to the Accounts, and served as the primary contact between Petitioners and Respondent. Pet. App. 4a.

While First Union had discretionary trading authority in each of the Accounts, First Union was nevertheless contractually obligated to execute orders given by Baigmohamed. Specifically, paragraph 8 of the boilerplate Account opening documents states in relevant part:

> 8. You may in your discretion, follow and rely on any instructions given orally, by telephone, telegraph, cable or radio that you believe to be genuine. You shall endeavor to obtain written confirmation of such instructions.

Pet. App. 3a. One should specifically note the permissive language in this boilerplate language: it stated that First Union "***may***" follow and rely upon oral instructions from Baigmohamed. However, that language was specifically amended and altered by an Addenda that was specifically drafted by the parties and signed on June 8, 1998, the same day as the boilerplate documents. This Addenda stated in relevant part:

> It is agreed that First Union National Bank of Virginia ("Agent") ***shall*** in its discretion, follow and rely on any instruction given by Humayun H.

> Baigmohamed, given via facsimile transmission, or given orally, by telephone, that Agent believes to be genuine. Agent shall endeavor to obtain written confirmation of such instructions.

Pet. App. 3a – 4a (emphasis added). Thus, it is plain that the clear purpose of the Addenda to the boilerplate contracts was to change the word "may" to "shall" and thereby change the underlying substantive result from merely granting First Union ***permission*** to rely on such instructions require Respondent to creating a ***mandatory obligation*** on the part of First Union to follow oral orders and instructions from Baigmohamed.

Thereafter, on or about April 4, 2000, Baigmohamed, in the company of his son Arif met with First Union representative Jim Lu at First Union's McLean, Virginia offices. Pet. App. 4a. At that meeting, Baigmohamed noted that the Federal Reserve Board had announced a quarter point rise in the federal funds rates on March 21, 2000 and instructed Mr. Lu to liquidate all of the Accounts' securities holdings, to convert those holdings into cash, and to invest the proceedings of these sales in United States Treasury issues. *Id.* As the above quoted portion of the Contracts demonstrates, First Union had a binding legal obligation to obey Baigmohamed's instructions.

However, First Union did not comply with these instructions. Instead, First Union continued trading in securities with the Accounts, using the Accounts' funds in a manner contrary to Baigmohamed's express instructions. *Id.* Petitioners did not know of First Union's disobedience until approximately May 10, 2000, when they received their April 2000 account statements. *Id.*

Between the time Baigmohamed gave his instruction – April 4, 2000 – and the time Petitioners discovered First Union's failure to carry it out, the value of his investments declined by a total of approximately $1,626,889. *Id.* As such, First Union's breach injured Petitioners' by this amount, plus interest.

Petitioners filed a complaint on January 11, 2005, in the Eastern District of Virginia alleging First Union had failed to carry out legitimate trading orders given orally by Baigmohamed. Respondent filed a Motion to Dismiss on March 21, 2005, which Petitioners opposed. Following receipt of Respondent's Reply, Petitioners filed a Motion for Leave to File a Surreply (with the proposed brief attached) to address issues raised for the first time in Respondent's Reply. The District Court granted both the Motion to Dismiss and the Motion to File a Surreply on April 15, 2005, simultaneously accepting Petitioners' proposed surreply and dismissing the case.

With respect to the Motion to Dismiss, the Court found that, first, under the account opening agreements ("Contracts"), "First Union was not required to follow oral instructions," and, alternatively, that "Defendants are only liable for actions constituting gross negligence or actual wrongdoing, which Plaintiffs do not allege in their complaint." Pet. App. at 4a. Petitioners timely filed a Notice of Appeal on May 12, 2005. A three-judge panel of the Fourth Circuit affirmed this dismissal on February 3, 2006. Pet. App. at 1a – 12a. Petitioner then filed a timely petition for rehearing en banc, which was denied on March 6, 2006. Pet. App. at 24a – 25a.

REASONS FOR GRANTING THE PETITION

I. The Seventh Amendment To The Constitution Requires That Questions Of Fact Be Left To A Jury.

This Court has noted that the Seventh Amendment "requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative." *Walker v. New Mexico & SPR Co.*, 165 U.S. 593, 596 (1897). Thus, "in actions at law under federal diversity jurisdiction the Seventh Amendment guarantees a right to trial by jury. Preservation of that right requires that questions of fact be left to the jury." *Peterson v. Exum*, 283 F.2d 499, 502 (9th Cir. 1960). The District Court's refusal to abide by this precept, coupled with the Circuit Court's refusal to correct this error, justifies a grant of certiorari and reversal. *See Carson v. Can. Life Assur. Co.*, 28 Fed. Appx. 262, 264 (4th Cir. 2002) ("While the interpretation of contract terms is ordinarily a question of law for the court, when a term is ambiguous, extrinsic evidence of its meaning may be received and its meaning becomes a question of fact for resolution by the jury.").

II. The Panel Wrongfully Resolved Questions Of Fact In Favor Of Respondent.

Under clear precedent, a motion made pursuant to Fed. R. Civ. P. 12(b)(6) should fail "unless it appears ***certain*** that the plaintiff[s] can prove ***no set of facts*** which would support [their] claim and would entitle [them] to relief." *Shepard v. Irving*, 77 Fed. Appx. 615, 621 (4th Cir. 2003) (emphasis added). In accordance with this precept, differing interpretations of contractual language containing ***any*** ambiguity should not be resolved on a Motion to Dismiss. *Carson*, 28 Fed. Appx. at 264.

In this case, the Panel constructed an ambiguous contractual provision of favor of Respondent. In doing so, they failed entirely to address an alternate interpretation of that provision put forth by Respondent. This justifies certiorari and reversal.

A. The Panel Wrongfully Interpreted An Ambiguous Contractual Provision In Favor Of Respondent.

This case primarily turns on a single, narrow factual question: what change the parties made to the Contracts when they mutually agreed those Contracts should be amended to change the phrase "may in your discretion," to "shall in its discretion." While the Panel properly noted "'shall' typically is mandatory in nature," the Panel nevertheless determined that "[t]he fact that the parties tempered 'shall' with 'in its discretion' in the [Addenda] is telling evidence that they did not intend to enact a mandatory duty." Pet. App. 9a. The Panel based this decision on their finding that "[a]ny other interpretation would treat 'in its discretion' as mere surplusage, which courts are disinclined to do." *Id.*

As such, the Panel found that the phrase "in its discretion" ***must*** operate ***as a matter of law*** to modify the word "shall," and that the Motion to Dismiss was therefore providently granted. This is inaccurate.

An equally plausible construction – indeed, a more plausible construction – is that the phrase "in its discretion" is a reference to the exercise of the discretionary authority possessed by Defendant. The parties explicitly addended the Contracts to ***limit*** that authority by agreeing that Defendant's exercise of its discretionary authority "***shall***" be subject to Petitioners' oral instructions. The Panels failure to consider this interpretation of the Addenda warrants certiorari and reversal.

A district court case from the Fourth Circuit, *Gilliam v. Hobert*, illustrates the proper construction of the provision at issue here. 952 F.Supp. 319 (W.D. Va. 1997). In *Gilliam*, the Court was asked to construe a provision from a corporation's proxy solicitation providing that the proxyholders would "allocate [their] votes among such number of nominees as [the proxyholders] ***shall in their discretion*** deem appropriate in order to elect the largest number of nominees possible." *Id.* at 324 (emphasis added).

The *Gilliam* court noted that this phrase should be interpreted as giving the proxyholders "the discretion to vote the shares ***in the manner most certain to assure the election of the greatest number of bank-nominated directors***." *Id.* (emphasis added). In other words, the proxy holders were free to use their discretion to determine how they would vote, but that discretion was to be ***limited*** by the obligation imposed by the second half of the provision – that is, the proxyholders must "elect the largest number of nominees possible."

This same precept holds true here. While Defendant had discretionary authority over the Accounts (as the phrase "in its discretion" clearly states), under the Addenda that authority was explicitly limited by the Contracts's mandate that Respondent "shall . . . follow and rely on any instruction given . . . orally" by Baigmohamed. Their failure to comply with this contractual limitation on their discretionary authority constituted a breach of the contract at issue. The Panel's decision thus wrongly drew inferences in the Respondent's favor, and wrongly affirmed the dismissal. As such, this Court should grant certiorari to correct this error.

B. The Panel Improperly Articulated A Factual Presumption In Favor Of Respondent.

The Panel partially based their decision on the factual presumption that Respondent would be unlikely to enter into an agreement consistent with Petitioners' interpretation of the ambiguous contractual language. Pet. App. 11a – 12a. Specifically, the Panel noted a mandatory obligation to follow oral instructions would disadvantage Defendant in the event a dispute over those instructions arose, as Defendant

> would have no written proof to show that it did not take the extreme step itself, but merely followed [Petitioners'] liquidation instructions. This scenario is ***most likely*** the reason that other provisions in the agreement actually requiring [Defendant] to follow plaintiffs' commands do so clearly and specify that plaintiffs will give the instructions in writing.[1]

Pet. App. 12a.

Simply put, on a Motion to Dismiss, the fact that a particular factual situation favorable to the movant is "most likely" true is not good enough. It must be ***"certain*** that the plaintiff[s] can prove ***no set of facts*** which would support [their] claim and would entitle [them] to relief." *Shepard*, 77 Fed. Appx. at 621. (emphasis added). Accordingly, when

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1. Any difference in the clarity of the Addenda compared to the language of the Original Contracts is likely the result of the fact that the Original Contracts were comprised of boilerplate language – no doubt drafted by attorneys – whereas the Addenda was prepared hastily by non-lawyer representatives of the parties in connection with the opening of the Accounts.

the Panel articulated a factual presumption ***against*** a modification of the Contracts, they acted contrary to established jurisprudence. *Id.* Any difficulty Respondent might have in putting forth evidence disproving Petitioners' claim was wholly irrelevant to the question at hand and the Panel erred in considering this.[2]

Had the Panel properly articulated the law applicable to this case, they would have been compelled to find for the Petitioners and reverse the dismissal. The proper presumption upon this Motion to Dismiss is that a brokerage firm handling a discretionary account is ***not*** empowered to ignore the plain instructions of the client who owns that account merely by virtue of the firm's discretionary authority. *Shepard*, 77 Fed. Appx. at 621; *see also Evans v. Saul Stone & Co.*, No. 51107-1, 1985 Wash. LEXIS 1270 *17 (Wash., Sept. 26, 1985) ("A broker is a fiduciary and ***must carry out the instructions of his client.***") (emphasis added).

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2. Moreover, when the Panel speculated that "[i]f . . . [Respondent] had honored [Petitioners] oral request and the value of the released securities had subsequently increased, plaintiffs might still have filed suit," Pet. App. 11a, the Panel failed to note that, subsequent to the Motion to Dismiss, the burden would rest on Petitioners' to adduce evidence in support of their claim, not vice versa. *Cooper v. Ameritex Yarn*, 04-5180, 2005 U.S. Dist. LEXIS 31680 *7 (D.S.C. 2005) ("This being an action for the breach of contract, the burden is upon Plaintiff to prove that there was a contract, the contract was breached, and the damages caused by such breach.").

III. The Factual Presumption In Favor Of Respondent Led To An Improper Finding That Respondent Had No Obligation To Follow Petitioners' Oral Instructions Pursuant To The Contracts And Their Addenda.

A. Addendum B To The Contracts Explicitly Stated That First Union "Shall" Follow Baigmohamed's Orders.

The Circuit Court erred in holding that the discretionary nature of the Accounts allowed Respondent, ***as a matter of law***, to evade a clearly defined responsibility under the Contracts. As the District Court noted without discussion, the contracts at issue were all amended to the events at issue in this proceedings. These Addenda were actually specifically prepared and signed by the parties on the same day – June 8, 1998.

The relevant contractual language from the Addenda reads as follows:

> It is agreed that First Union National Bank of Virginia ("Agent") ***shall***, in its discretion, ***follow and rely on any instruction given by Humayn H. Baigmohamed*** . . . given orally, by telephone, that Agent believes to be genuine .[3]

Pet. App. at 3a. These Addenda unambiguously ***limited*** First Union's exercise of its discretionary authority. Thus, these Addenda created a ***binding contractual obligation*** for First Union to follow Baigmohamed's oral instructions. This legal obligation explicitly superceded any discretionary authority granted to First Union.

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3. Some of the contracts also obligate First Union to follow instructions given by Shereen Baigmohamed in addition to Baigmohamed.

B. A Reasonable Reading Of The Addenda Indicates That Respondent Was Obligated To Follow Baigmohamed's Instructions.

The law views the word "shall" as imposing a mandatory obligation on parties:

> In its ordinary signification, "shall" is a word of command, and is the language of command, and is the ordinary, usual, and natural word used in connection with a mandate. In this sense "shall" is inconsistent with, and excludes, the idea of discretion, and operates to impose a duty which may be enforced. . . . unless an intent to the contrary appears; ***but the context ought to be very strongly persuasive*** before it is softened into a mere permission.

Last v. Virginia State Bd. of Med., 14 Va. App. 906, 911 (Va. Ct. App. 1992) (emphasis added; constructing statutory language).

Accordingly the word "shall" imposes an obligation unless there are strong indicators to the contrary. Indeed, the cases Respondent cited in the briefing on their Motion to Dismiss demonstrate as much:

> It is true that the statute, in declaring who may be beneficiaries, uses the word ***"shall," but while that word may primarily be mandatory in its effect, and the word "may" primarily permissive***, yet the courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe 'may'

> and 'shall' as permissive or mandatory in accordance with the subject matter and context.

Pettus v. Hendricks, 113 Va. 326, 330 (Va. 1912) (emphasis added); *see also Ross v. Craw*, 343 S.E.2d 312, 316 (Va. 1986) ("As we have noted in the past, the word 'shall' is primarily mandatory in its effect and the word 'may' is primarily permissive"). The "in its discretion" language in the Addenda fails to rise to the "very strongly persuasive" level necessary to warrant disregarding the presumption that the word "shall" carries with it a mandatory obligation.[4]

At most, Respondent's Motion to Dismiss raised an issue of ambiguous construction of a contractual provision. Such issues are improper for adjudication on a motion to dismiss. *Carson*, 28 Fed. Appx. at 264.

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4. The carry over of the "in its discretion" from the boilerplate to the Addenda should be viewed as simply continuing to acknowledge that these were, in fact, discretionary accounts, but further *limiting* the discretion by adding the word "shall," thus obligating First Union to follow the instructions of Baigmohamed. *See Last*, 14 Va. App. at 911 ("'[S]hall' is inconsistent with, and excludes, the idea of discretion, and operates to impose a duty which may be enforced"); *S. Fla. Beverage Corp. v. Figueredo*, 409 So.2d 490, 496 (Fla. Dist. Ct. App. 1981) ("It may be presumed, however, that an amendment to an agreement is designed to serve some useful function, and its existence is strong evidence, therefore, that the contract was changed from what the parties believed and intended was provided before.'); *Hartford Ins. Co. v. CMC Builders*, 752 P.2d 590, 591-92 (Colo. App. 1988) ("[W]e must assume that the addendum was inserted for some purpose. . . . To hold otherwise would render the addendum superfluous.")

C. The Change In Wording In The Addenda Presumptively Changed The Parties' Substantive Obligations Under The Contracts.

In holding that the Contracts created no obligation on the part of First Union to follow Baigmohamed's express oral instructions, the District Court erred by assuming that the Addenda to the Contracts served no purpose and were entirely superfluous. Indeed, the Seventh Amendment requires the District Court to presume quite the opposite.

It is a basic rule of contract construction that an addendum to a contract presumptively serves some purpose. *See Hartford Ins. Co.*, 752 P.2d at 591-92; *S. Fla. Beverage Corp.*, 409 So.2d at 496 ("It may be presumed, however, that an amendment to an agreement is designed to serve some useful function, and its existence is strong evidence, therefore, that the contract was changed from what the parties believed and intended was provided before."). The District Court failed to address this point.

Again, paragraph 8 of the boilerplate contract provided:

> You ***may*** in your discretion, follow and rely on any instructions given orally, by telephone, telegraph, cable or radio that you believe to be genuine. You shall endeavor to obtain written confirmation of such instructions.

A012-13 (Emphasis added.)

However, the boilerplate contracts were amended by Addenda prepared and signed by both parties on the same day the Contracts were signed. These Addenda provided:

> It is agreed that First Union National Bank of Virginia ("Agent") ***shall*** in its discretion, follow and rely on any instruction given by Humayun H. Baigmohamed, given via facsimile transmission, or given orally, by telephone, that Agent believes to be genuine. Agent shall endeavor to obtain written confirmation of such instructions.

Appendix at A014 (emphasis added). These provisions closely mirror each other, with one significant difference: the Addenda state that Wachovia "shall" follow the instructions of Baigmohamed, whereas the boilerplate stated that Wachovia "may" follow such directions. The District Court did not address this key difference, nor did the Court address the fact that the parties went to the trouble of crafting and agreeing to these addenda. Indeed, the District Court gave no significant discussion to the language of the Addenda at all.[5]

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5. The "analysis" portion of the District Court's opinion merely states:

> The agreements further provide that First Union could in its discretion follow oral instruction. The Agreements state, "You ***may in your discretion, follow and rely on any instructions given orally,*** by telephone, telegraph, cable, or radio that you believe to be genuine. You shall endeavor to obtain written confirmation of such instructions." This same paragraph was modified by the Addenda with language that in pertinent part states,

(Cont'd)

Contrary to the presumption that these Addenda were drafted and agreed upon in order to alter the provisions of the boilerplate contracts, the District Court instead assumed that ***the provisions have identical meaning***. That is, Respondent argued, and the Court ruled, that ***both*** provisions provide Respondent with ***an identical degree of*** discretion to disregard oral instructions from Baigmohamed as it saw fit.

Respondent's initial Motion to Dismiss was directed ***solely*** at the unaddended version of the Contract. Respondent did not address the addenda to the Contracts until filing their Reply to Plaintiff's Opposition to the Motion to Dismiss, in which they argued that "[a]ll the Addendum does is acknowledge that Baigmohamed was authorized to give instructions with respect to the Accounts which, if oral, the Bank, in its discretion, could follow or choose not follow." Thus, First Union's interpretation of the Addenda – accepted by the District Court – would render them completely and utterly superfluous. In fact, this position rests upon the proposition that the parties went to the trouble of preparing and signing these Addenda for no reason whatsoever.

This is not a reasonable inference, particularly on consideration of a motion to dismiss (where all inferences

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(Cont'd)

> [i]t is agreed that First Union . . . ***shall in its discretion***, follow and rely on any instruction given by Humayun H. Baigmohamed, given via facsimile transmission, or given orally, by telephone, that the Agent believes to be genuine. Agent shall endeavor to obtain written confirmation of such instructions.

Pet. App. 19a.

must be drawn in Plaintiff's favor), because it is presumed that when parties execute a modification agreement, they wish to change the terms of the contract. *See Caven v. Am. Fed. Sav's and Loan Ass'n of Colo.*, 837 F.2d 427, 431 (10th Cir. 1988) ("First, the parties executed a *modification* agreement. We assume that they wanted to change the prior terms of their contract. . . . We do not believe the parties intended to adopt modifying language without any force.") Here, the parties specifically substituted the word "shall" for "may" in the contracts; presumably, this had some effect. Given the natural construction of the word "shall," the proper interpretation would be that the obligations imposed on Wachovia were mandatory, and that the Addenda were intended to have the effect of obligating Wachovia to follow the express oral instructions of Baigmohamed. As such, the District Court finding that First Union had no such responsibility was error, and this Court should reverse the judgment.

D. Discretionary Accounts Do Not Empower Brokerage Firms To Ignore Direct Orders From Their Clients.

The District Court erred in accepting Respondent's meritless claim that a brokerage firm handling a discretionary account is, as a matter of law, empowered to ignore the plain instructions of the client who owns that account.[6] With "respect to . . . a discretionary account, the broker has a continuing duty to . . . manage the account in a manner

6. A discretionary account is "[a]n account in which the customer gives the broker discretion, as to the purchase and sales of securities or commodities, including selection, timing, and price to be paid or received." *Stevens v. Abbott, Proctor & Paine*, 288 F. Supp. 836, 839 n.2 (E.D. Va. 1968).

directly comporting with the needs ***and objectives*** of the customer." *In re Murphy*, 297 B.R. 332, 349 (Bankr. D. Mass. Aug. 28, 2003) (emphasis added); *see also Evans v. Saul Stone & Co.*, No. 51107-1, 1985 Wash. LEXIS 1270 (Wash., Sept. 26, 1985). ("A broker is a fiduciary and must carry out the instructions of his client"). A broker who fails to act pursuant to a direct order by their client has not managed the account in accordance with the objectives of the customer and, accordingly, has failed entirely to comply with the basic duties they owe that customer.

Taken to its logical conclusion, Respondent's view of the nature of a discretionary account would support the proposition that a broker managing such an account could refuse to return to the owner of the account the funds contained therein. This contention is unsupportable, particularly in light of the specific language in the contract at issue here obligating Respondent to obey Baigmohamed's oral instructions.

Simply put, the purpose of a discretionary account is to enable a brokerage firm to execute trades for the benefit of a customer absent approval for each individual trade from that customer, not to enable a brokerage firm to escape liability for willingly disobeying the orders of a client. *See SEC v. Zandford*, 535 U.S. 813, 823 (2002) (noting "[t]he benefit of a discretionary account is that it enables individuals . . . who lack the ***time, capacity, or know-how to supervise investment decisions***, to delegate authority to a broker who will make decisions in their best interests without prior approval.") (emphasis added).[7]

7. Here, as Baigmohamed gave express instructions concerning the management of his accounts, he plainly has the time to supervise investment decisions.

Thus, discretionary authority allows brokers to act autonomously for the client's benefit, but does not empower them to ignore the client's direct orders.

Thus, Respondent here cannot rely on its discretionary authority to escape liability as a matter of law for the clear breach of the Contracts noted in the preceding section. Since the District Court found otherwise, and because the Court of Appeals affirmed that decision, this Court should grant certiorari and reverse their decision.

CONCLUSION

For the foregoing reasons, Petitioners respectfully requests that the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED FEBRUARY 3, 2006

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 05-1536

TRUMBALL INVESTMENTS LIMITED I; TRUMBALL INVESTMENTS LIMITED II; MOLINA INTERNATIONAL LIMITED; IVYWILD INVESTMENT CORPORATION; CORTLAND OVERSEAS LIMITED; TERREL OVERSEAS, INCORPORATED,

Plaintiffs-Appellants,

v.

WACHOVIA BANK, N.A., formerly known as First Union National Bank,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Gerald Bruce Lee, District Judge. (CA-05-15-GBL-BRP)

Argued: November 30, 2005.

Decided: February 3, 2006

Before WILKINSON, KING, and SHEDD, Circuit Judges.

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Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge King and Judge Shedd joined.

OPINION

WILKINSON, Circuit Judge.

A discretionary investment account, in which an investor permits a broker to engage in trades without prior authorization, can be advantageous because it allows the broker the freedom to exercise his expertise on the investor's behalf in accordance with the investor's stated objectives. In this case, the clients of a bank brought suit alleging that language in a discretionary investment contract compelled the bank to follow certain oral investment instructions and that it failed to do so. The district court dismissed the suit. We affirm, because the parties failed to manifest an intention to tie the bank's hands in an agreement whose very purpose was to confer discretion on the bank to make investment decisions.

I.

Plaintiffs are a group of six corporations, Trumball Investments Limited I, Trumball Investments Limited II, Molina International Limited, Ivywild Investment Corporation, Cortland Overseas Limited, and Terrel Overseas, Incorporated. Plaintiffs contracted with First Union National Bank ("First Union"), the predecessor in interest of defendant Wachovia Bank, N.A. Each of the plaintiffs maintained an investment account with First Union, which was entrusted with managing the accounts.

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A similarly worded agreement governed each account. First Union was required to follow the instructions in the agreement and "such other instructions as may from time to time be furnished in writing." The relevant instructions in the original agreement provided as follows:

> 1. You [First Union] are to provide investment review and management of the Account, taking such actions as you, in your discretion, deem best with respect to the investment and reinvestment of the property held therein as though you were the owner of such property.
>
> . . .
>
> 8. You [First Union] may in your discretion, follow and rely on any instructions given orally, by telephone, telegraph, cable or radio that you believe to be genuine. You shall endeavor to obtain written confirmation of such instructions.

The parties drafted an Addendum to the agreement. The applicable provision of the Addendum provided:

> B. It is agreed that Paragraph 8 . . . shall be modified to annex the additional language: It is agreed that First Union National Bank of Virginia ("Agent") shall in its discretion, follow and rely on any instruction given by Humayun H. Baigmohamed, given via facsimile transmission, or given orally, by telephone, that Agent believes

> to be genuine. Agent shall endeavor to obtain written confirmation of such instructions.

Both the agreement and the Addendum were executed on June 8, 1998.

On approximately April 4, 2000, Humayun Baigmohamed, an authorized agent of plaintiffs, met with Jim Lu, a First Union employee, at First Union's Virginia offices. Baigmohamed instructed Lu to liquidate all the securities in the accounts because the federal funds interest rate had risen. He further told Lu that First Union should invest the proceeds of these sales in United States Treasury issues. Plaintiffs have not indicated that Baigmohamed ever provided this instruction in writing.

First Union did not carry out Baigmohamed's request to sell the securities. Plaintiffs did not notice this discrepancy until Baigmohamed received the April account statements on May 10, 2000. In the interim, the accounts decreased in value by $1,626,889.

On January 11, 2005, plaintiffs brought suit in the Eastern District of Virginia on the basis of diversity jurisdiction. *See* 28 U.S.C. § 1332(a)(2) (2000). They alleged that First Union breached its contract with plaintiffs when it failed to follow Baigmohamed's oral instructions to sell the securities and buy United States Treasury issues. They sought as damages the decline in the value of the securities. First Union filed a motion to dismiss under Rule 12(b)(6), which the district court granted. Plaintiffs appeal.

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II.

At the outset, we note that this case involves investment accounts, of which there are two general types: non-discretionary and discretionary. A non-discretionary account requires the broker to obtain authorization before it makes any investment decisions. *See Merrill Lynch Pierce Fenner & Smith, Inc. v. Cheng*, 901 F.2d 1124, 1128 (D.C. Cir. 1990); *Hill v. Bache Halsey Stuart Shields Inc.*, 790 F.2d 817, 820 n. 3 (10th Cir. 1986). A discretionary account, by contrast, allows an investment broker to make account transactions without the client's prior approval. *See Cheng*, 901 F.2d at 1128; *Hill*, 790 F.2d at 820 n. 3.

In return for this grant of discretion, a broker operating a discretionary account typically owes greater duties to his client than a broker who must receive uthorization for each transaction. *See, e.g., Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940-41 (2d Cir. 1998) (noting that typically a broker operating a discretionary account has a general fiduciary duty to his client whereas a broker operating a non-discretionary account has narrower obligations); *Hill*, 790 F.2d at 824 (same); *see also Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951, 953 (E.D. Mich. 1978) (describing a broker operating a discretionary account as "the fiduciary of his customer in a broad sense"). Most notably, the broker managing a discretionary account has to make investment decisions that are faithful to the needs and objectives of his client. *Leib*, 461 F. Supp. at 953.

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Investors may prefer a discretionary account because it has the potential to decrease the costs of transacting in financial markets. Many individuals do not have the knowledge required to efficiently manage their investments. For them, an experienced broker has a decided information advantage and can procure information relevant to an investment decision at lower cost. A discretionary account therefore allows experts to handle investment decisions with the result that less informed investors are not foreclosed from participating in complex markets. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. Chi. L. Rev. 611, 651 (1985) (noting that the purpose of giving a broker discretion is "to use the broker's comparative advantage"). While non-discretionary accounts also allow an investor to rely on a broker's recommendation and superior knowledge, discretionary accounts can be of greater utility because any decision will be made solely on the broker's first-hand knowledge and expertise.

In addition to informational advantages, discretionary trading accounts also hold forth the promise of reduced administrative costs, because brokers are not required to confer with clients prior to executing every transaction. Even some sophisticated investors, who presumably could manage their own accounts, simply may not have the time or inclination to carefully consider and authorize each transaction. Investment decisions can often require significant time, as brokers must explain the decision and clients must mull it over. And many investment opportunities have only a limited window; a broker might not be able to obtain a client's authorization before the opportunity expires. *See, e.g., Curran v. Merrill Lynch, Pierce, Fenner*

& Smith, Inc., 622 F.2d 216, 221 (6th Cir. 1980) (noting that "[d]iscretionary accounts are more common for commodities where fast trading is required due to sharp movement in prices"), *aff'd*, 456 U.S. 353 (1982). Investors may thus see an advantage in delegating the oversight of these accounts to a broker who specializes in portfolio management and who has the necessary technology and personnel to conduct transactions rapidly and on a large scale.

The end result is that beneficial investments which might not otherwise take place — due to either information deficiencies or administrative costs — may now occur. *See also SEC v. Zandford*, 535 U.S. 813, 823 (2002) (a discretionary account "enables individuals . . . who lack the time, capacity, or know-how to supervise investment decisions, to delegate authority to a broker who will make decisions in their best interests without prior approval"). The costs of investing are reduced by allocating them to an agent who can bear them most cheaply. And since investments drive general economic productivity and growth, providing a broker with discretion can enhance both individual and social welfare.

Plaintiffs do not dispute that their agreement with First Union created discretionary investment accounts. Nor could they. The agreement is captioned "Discretionary Account" and is replete with language explicitly underscoring First Union's discretionary powers. Paragraph 1, for example, specifies that First Union is "to provide investment review and management" of the accounts, to make investment decisions that it, in its discretion, deems best, and to handle the property in the accounts "as though [it] were the owner of such property." Furthermore, Paragraph 7 indicates that

First Union is under no obligation to take any action other than that already specified with respect to any property in the accounts "unless specifically agreed to by [it] in writing." Thus, keeping in mind that First Union was vested with discretion in making investment decisions, we turn to the specific contractual provisions at issue.

III.

Plaintiffs argue that the Addendum set forth a mandatory duty, and that First Union thus breached its obligations under the agreement when it did not follow Baigmohamed's oral instructions to liquidate all securities in the accounts. The Addendum provided that First Union "shall in its discretion, follow and rely on any instruction given by Humayun H. Baigmohamed, given via facsimile transmission, or given orally, by telephone." Under Virginia law, "when the terms of a contract are clear and unambiguous, a court is required to construe the terms according to their plain meaning." *Golding v. Floyd*, 261 Va. 190, 539 S.E.2d 735, 736 (2001). We disagree with plaintiffs' interpretation both because the plain language of the Addendum requires otherwise, and because it runs counter to the undisputed discretionary nature of the agreement.

A.

The Addendum unambiguously gives First Union discretion to follow Baigmohamed's investment instructions. Most importantly, the plain meaning of the phrase "shall in its discretion" allows First Union to use its expert judgment. *See The Random House Dictionary of the English Language*

563 (2d ed.1987) (defining discretion as "the power or right to decide or act according to one's own judgment; freedom of judgment or choice").

Plaintiffs are of course correct that "shall" typically is mandatory in nature. *See Ross v. Craw*, 231 Va. 206, 343 S.E.2d 312, 316 (1986) (noting that "shall" is "primarily mandatory in its effect" and "may" is "primarily permissive"). But courts must look to the context in which "shall" is used in ascertaining its meaning. *See id.* (citing *Pettus v. Hendricks*, 113 Va. 326, 74 S.E. 191, 193 (1912)). The word "shall" cannot be interpreted in a vacuum, as plaintiffs contend, and the words around it help elucidate the overall meaning of the clause. "Shall in its discretion" has an entirely different meaning than "shall" standing alone. Any other interpretation would treat "in its discretion" as mere surplusage, which courts are disinclined to do. *See, e.g., Richfood, Inc. v. Jennings*, 255 Va. 588, 499 S.E.2d 272, 276 (1998) ("No word or clause will be treated as meaningless if a reasonable meaning can be given to it.") (internal quotation marks omitted).

Moreover, other parts of the agreement utilize the word "shall" without the modifier "in its discretion," indicating that the parties knew how to draft a mandatory obligation. Paragraph 2, for example, provides that registered securities "shall be registered in [First Union's] nominee or nominees, or [its] name as Agent." Similarly, Paragraph 3 instructs that First Union "shall" dispose of any income from the accounts according to the plaintiffs' written directions. The fact that the parties tempered "shall" with "in its discretion" in the

Addendum is telling evidence that they did not intend it to enact a mandatory duty.

Plaintiffs nonetheless contend that the only relevant distinction between the Addendum and Paragraph 8 is the use of the word "shall" instead of "may," and that interpreting the Addendum's language as permissive makes it superfluous. But there are other salient differences between the two clauses that do not require us to read out the Addendum's discretionary language. Most notably, Paragraph 8 does not detail precisely who will give the instructions. In contrast, the Addendum provides greater specificity — the instructions will be given by Baigmohamed. In addition, Paragraph 8 specifies that First Union may follow "instructions given orally, by telephone, telegraph, cable or radio." The Addendum, however, modifies this list to include instructions "given via facsimile transmission." Plaintiffs, therefore, have provided no persuasive reason to construe "shall in its discretion" contrary to its plain meaning.

B.

Our interpretation of the contract also finds support in the undisputed nature of the agreement itself. *See Quadros & Assocs., P.C. v. City of Hampton*, 268 Va. 50, 597 S.E.2d 90, 93 (2004) ("We consider the contract as a whole and do not place emphasis on isolated terms."). These are, after all, discretionary accounts — in which the operating presumption in the parties' relationship is that an expert broker will make appropriate investments on behalf of and without prior authorization from its client. The accounts by definition give the broker substantial discretion to use its best judgment.

Had the parties intended the Addendum to depart from this understanding and transform the entire nature of their relationship, we expect they would have done so in a less opaque manner. Otherwise, the potential gains the parties attempted to generate with their use of discretionary accounts would go for naught.

A contrary presumption would moreover place a broker in an untenable Catch-22. In this case, for example, First Union might have been subjected to litigation and potential liability whether or not it followed Baigmohamed's dramatic oral instructions to liquidate all the securities holdings and place the proceeds in Treasury issues. On the one hand is the present situation — First Union did not follow the instructions, the value of the securities in the accounts decreased, and First Union now confronts plaintiffs' action.

If, on the other hand, First Union had honored Baigmohamed's extraordinary oral request and the value of the released securities had subsequently increased, plaintiffs might still have filed suit. They could now contend that First Union failed to take appropriate care in not making further inquiry before embarking on the drastic step of liquidating all the securities in all the accounts and changing the entire nature of the investments from equity to fixed-income — a move potentially in conflict with plaintiffs' investment objectives. This is cause for real concern, since a broker operating a discretionary account generally owes greater duties to its client than a broker who must receive authorization for each transaction. *See, e.g., Indep. Order of Foresters*, 157 F.3d at 940-41; *Hill*, 790 F.2d at 824; *Leib*, 461 F. Supp. at 953. First Union would have no written proof

to show that it did not take the extreme step itself, but merely followed Baigmohamed's liquidation instructions. This scenario is most likely the reason that other provisions in the agreement actually requiring First Union to follow plaintiffs' commands do so clearly and specify that plaintiffs will give the instructions in writing.*

IV.

In sum, we are loath to limit First Union's discretion in managing the investment accounts absent some clear direction to the contrary. Since the parties did not provide any such language in their agreement, and instead unambiguously allowed First Union to use its discretion, the judgment of the district court is

AFFIRMED.

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* The parties also dispute whether the exculpatory clause in Paragraph 7 of the agreement barred the suit. This paragraph provided in relevant part that First Union "shall be liable only for losses caused by gross negligent management or actual wrong-doing." Plaintiffs argue that this clause does not apply because First Union's failure to follow their express trading instructions represented gross negligence. First Union counters that plaintiffs did not allege gross negligence or actual wrong doing in their complaint and that, in any event, the challenged actions did not amount to gross negligence. Because of our disposition of the case, we do not reach this issue.

APPENDIX B — MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION ENTERED APRIL 15, 2005

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

Case No. 1:05cv15 (GBL)

TRUMBALL INVESTMENTS, LTD. I, TRUMBALL INVESTMENTS, LTD. II, MOLINA INTERNATIONAL, LTD., IVYWILD INVESTMENT CORP., CORTLAND OVERSEAS, LTD., AND TERREL OVERSEAS, INC.,

Plaintiffs,

v.

WACHOVIA BANK, N.A., FKA FIRST, UNION NATIONAL BANK,

Defendants.

MEMORANDUM ORDER

THIS MATTER is before the Court on Motion of Defendant, Wachovia Bank, National Association, f/k/a First Union National Bank ("First National," "Bank," or "Defendant") to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6). This case is a breach of contract case in which Plaintiffs Trumball Investments Ltd. I, Trumball Investments Ltd. II, Molina International, Ltd., Ivywild Investment Corp.,

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Cortland Overseas, Ltd., and Terrel Overseas, Inc. (hereinafter collectively "Plaintiffs") allege that Defendant failed to carry out legitimate trades as ordered by Humayun Baigmohamed, an authorized agent for Plaintiffs. The issue in this case is whether Plaintiffs have stated a claim for breach of contract by alleging that Defendants failed to follow the oral instructions issued by Mr. Baigmohamed with respect to the six investment accounts (hereinafter "Accounts") between Plaintiffs and First Union, predecessor in interest to Defendant Wachovia Bank. The Court holds that Motion of Defendant to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) is granted because under the Discretionary Account Agreement, First Union was not required to follow oral instructions. Furthermore, the exculpatory clause in the Agreement states that Defendants are only liable for actions constituting gross negligence or actual wrongdoing, which Plaintiffs do not allege in their complaint.

I. BACKGROUND

This lawsuit arises out of Accounts between Plaintiffs and First Union. Complaint ¶¶ 5, 7. Humayun Baigmohamed acted as an officer and authorized agent for each Plaintiff company with respect to the Accounts, and was the primary contact between Plaintiffs and Defendant. *Id.* ¶ 6. Plaintiffs allege that on April 4, 2000, Mr. Baigmohamed and First Union representative Jim Lu had a meeting at which Mr. Baigmohamed "noted that the federal funds interest rate had been raised, and instructed Mr. Lu to liquidate all of the Accounts' securities holdings and to convert the Accounts' holdings entirely into cash." *Id.* ¶ 11. In addition,

Mr. Baigmohamed instructed Mr. Lu to invest the proceeds of these sales in United States Treasury issues. *Id.* Plaintiffs further allege that First Union failed to carry out Mr. Baigmohamed's instructions and continued trading in securities in the Accounts. Mr. Baigmohamed was unaware of Mr. Lu's failure to convert the Accounts holdings into cash until approximately May 10, 2000. *Id.* ¶ 13. Plaintiffs allege that between April 3, 2000 through May 10, 2000 the value of the Accounts declined by approximately $1,626,889. *Id.*

The Accounts are each governed by a Corporate Agency Agreement (Discretionary Account) ("Discretionary Account Agreement" or "Agreement"). Plaintiffs attached an exemplar Discretionary Account Agreement as an exhibit to the Complaint. *Id.* ¶ 9, Attachment A. The Discretionary Account Agreement provides in pertinent part:

> 1. You are to provide investment review and management of the Account, taking such actions as you, in your discretion, deem best with respect to the investment and reinvestment of the property held therein as though you were the owner of such property.
>
> *****
>
> 7. You shall be liable only for losses caused by gross negligent management or actual wrongdoing and in the exercise of your discretionary powers you shall not be limited by rules applying to trusts and similar fiduciary relationships. You have no responsibility for the acts of agents (other than regular employees) provided you

use reasonable care in selecting them. It is understood and agreed that you shall be under no duty to take any action other than herein specified with respect to any securities or other property at any time deposited hereunder unless specifically agreed to by you in writing or to appear in or defend any suit with respect thereto unless requested by the undersigned in writing and indemnified to your satisfaction.

8. You may in your discretion, follow and rely on any instructions given orally, by telephone, cable, or radio that you believe to be genuine. You shall endeavor to obtain written confirmation of such instructions.

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ADDENDUM

B. It is agreed that First Union National Bank of Virginia ("Agent") shall in its discretion, follow and rely on any instructions given by Humayan H. Baigmohamed, given via facsimile transmission, or given orally, by telephone, that Agent believes to be genuine. Agent shall endeavor to obtain written confirmation of such instructions.

Discretionary Account Agreement. The Discretionary Account Agreement represents a binding contract between Plaintiffs and the Bank. *Id.* ¶ 15.

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II. DISCUSSION

A. Standard of Review

A Federal Rule of Civil Procedure 12(b)(6) motion should not be granted unless it appears beyond a doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief. FED. R. CIV. P. 12 (b)(6); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In considering a Rule 12(b)(6) motion, the Court must construe the complaint in the light most favorable to the plaintiffs, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Labs, Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Conclusory allegations regarding the legal effect of the facts alleged need not be accepted. *See Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995). Because the central purpose of the complaint is to provide the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests," the plaintiff's legal allegations must be supported by some factual basis sufficient to allow the defendants to prepare a fair response. *Conley*, 355 U.S. at 47.

B. Analysis

The Court grants Defendant's Motion to Dismiss because the Discretionary Account Agreement and its Addendum vest First Union with discretion for investment decisions and does not require First Union to follow the oral instructions of Mr. Baigmohamed. Additionally, the Discretionary Account Agreement contains an exculpatory clause that limits First Union's liability to losses in the Accounts caused by gross negligence or actual wrongdoing. For these reasons, Plaintiffs

fail to state a claim upon which relief can be granted. Accordingly, the Court grants Defendants motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

No Obligation to Follow Oral Instructions Under Discretionary Account Agreements

Plaintiffs do not state a cause of action for breach of contract because the Discretionary Account Agreements do not obligate First Union to follow Mr. Baigmohamed's oral instruction. Under Virginia law, to recover for breach of contract, a plaintiff must prove "(1) a legally enforceable obligation of the defendant to the plaintiff; (2)the defendant's violation or breach of that obligation; and (3) injury or damage to the plaintiff caused by the breach of the obligation." *Filak v. George*, 267 Va. 612, 619, 594 S.E.2d. 610, 614 (2004). Plaintiffs do not state a claim for breach of the Discretionary Account Agreements.

A discretionary account gives a broker the authority to carry out transactions on behalf of its clients without prior authorization. In a discretionary account, "the broker has the authority to make trades on the broker's own initiative for the best interests of the customer." *Prudential Bache Securities, Inc. v. Pittman*, No. CIV.A.89-85-T, 1991 WL 160039 at *4 (N.D. Ga. April 4, 1991). As the Supreme Court of the United States explained, "[t]he benefit of a discretionary account is that it enables individuals, . . . who lack the time, capacity, or know-how to supervise investment decisions, to delegate authority to a broker who will make decisions in their best interests without approval." *Securities and Exchange Commission v. Zandford*, 535 U.S. 813, 823 (2002).

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In this case, the Discretionary Account Agreements between First Union and Plaintiffs vested First Union with discretion to make investment decisions for each of the Accounts. The Discretionary Account Agreements state that First Union was "to provide investment review and management of the Account, taking such actions as you, *in your discretion,* deem best with respect to the investment and reinvestment of the property held therein *as though you were the owner of such property."* Complaint, Ex. A, Agreement ¶ 1 (emphasis added).

The agreements further provide that First Union could in its discretion follow oral instructions. The Agreements state, "You *may in your discretion, follow and rely on any instructions given orally,* by telephone, telegraph, cable or radio that you believe to be genuine. You shall endeavor to obtain written confirmation of such instructions." *Id.* ¶ 8. This same paragraph was modified by the addendum with language that in pertinent part states,

> [i]t is agreed that First Union . . . *shall in its discretion,* follow and rely on any instruction given by Humayun H. Baigmohamed, given via facsimile transmission, or given orally, by telephone, that Agent believes to be genuine. Agent shall endeavor to obtain written confirmation of such instructions.

Agreement Addendum ¶ B. In addition, the Agreements stated that First Union does not have a duty to take action unless it was specifically agreed to in writing. The Agreements state, "[i]t is understood and agreed that you *shall be under no*

duty to take any action other than herein specified with respect to any securities or other property at any time deposited hereunder *unless specifically agreed to by you in writing. . .*" Agreement ¶ 7 (emphasis added).

Under the Agreements, First Union was given discretion to make investment decisions with regard to the Accounts and was to treat the Accounts as if it were the owner. First Union was also given discretion as to whether or not to follow any oral instructions. Specifically, First Union was under no duty to follow any instructions with regards to the account unless they were agreed to in writing. In this case, there was no written instruction from Mr. Baigmohamed and there can be no liability for breach of contract.

Exculpatory Clause

Plaintiffs can not recover because the Discretionary Account Agreements contain exculpatory clauses. The Agreements state that First Union is liable to Plaintiffs only for losses caused by gross negligence or actual wrongdoing. Agreement ¶ 7. Specifically, the Agreements state, "you shall be *liable only for losses caused by gross negligent management or actual wrongdoing* and in the exercise of your discretionary powers you shall not be limited by rules applying to trusts and similar fiduciary relationships." *Id.* Virginia courts regularly enforce exculpatory agreements. *See, e.g., Barnes v. Crystal Plaza*, 11 Va. Cir. 442 at *2 (Arl. Cir. 1977) Generally an exculpatory clause will be enforced if the agreement (1) does not contravene public policy (2) can be readily understood by a reasonable person in the plaintiff's position, and; (3) it clearly and unequi-

vocally releases the defendant from precisely the type of liability alleged by the Plaintiff. *See Hiett v. Barcroft Beach Inc.*, 18 Va Cir. 315 (1989), *rev'd on other grounds, Hiett v. Lake Barcroft Community Association, Inc.*, 244 Va. 191 (1992). The exculpatory clauses contained in the Agreements meet these requirements and are therefore valid and enforceable.

First, the exculpatory clauses contained in the agreement do not offend public policy. Courts regularly enforce exculpatory clauses in discretionary investment accounts. *See, e.g., Wolf v. Ford*, 335 Md. 525, 644 A.2d 522 (1994), *Piercy v. Citibank, N.A.*, 101 Misc.2d 302, 424 N.Y.S.2d 76 (1978), *aff'd* 48 N.Y.2d 900, 400 N.E.2d 1349 (1979). In this case, the exculpatory clauses are agreements between sophisticated parties to allocate the risk of negligence in the management of discretionary accounts and therefore do not offend the public interest.

Second, the exculpatory clauses can be easily understood by the parties. An exculpatory clause must be "clear and definite" to relieve a party from liability for his own negligence. *See Krazek v. Mountain River Tours, Inc.*, 884 F.2d 163, 165 (4th Cir. 1989). In this case, the exculpatory clauses contained in the Agreements are easily understandable and clearly and definitely state that First Union is liable "only for losses caused by gross negligent management or actual wrongdoing . . ." Agreement ¶ 7. Third, the language of the Agreements clearly releases the defendant from liability for losses other than those resulting from gross negligence or actual wrongdoing.

Furthermore, there are no allegations of gross negligence or actual wrongdoing. Virginia law defines gross negligence as follows:

> "Gross negligence" has been defined as the absence of slight diligence, or the want even of scant care. It is the degree of negligence as should shock fair-minded men although something less than willful recklessness. Although the term is difficult to define apart from the context of specific facts, it is apparent that it is closely related to, if not identical to, civil recklessness.

Coppage v. Mann, 906 F. Supp. 1025, 1048 (E.D. Va. 1995) (citations omitted). In this case there are no allegations of gross negligence or other conduct that constitutes recklessness or actual wrongdoing. Plaintiffs merely allege that First Union failed to follow Mr. Baigmohamed's oral instructions with respect to the Accounts. Under the Discretionary Account Agreement, First Union had the discretion to decide whether or not to follow the oral instructions. Accordingly, the fact that First Union did not follow the oral instruction does not constitute gross negligence or actual wrongdoing. It was merely a discretionary decision for which First Union can not be held liable under the clear terms of the agreement. Accordingly, Defendants can not be held liable for breach of contract and the Plaintiffs complaint is dismissed for failure to state a claim upon which relief can be granted.

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III. CONCLUSION

Plaintiffs fail to state a claim upon which relief can be granted because under the Discretionary Account Agreement, First Union was not required to follow oral instructions. Additionally, the Agreements contain exculpatory clauses that state Defendants are only liable for actions constituting gross negligence or actual wrongdoing, which Plaintiffs do not allege in their complaint. Accordingly, it is hereby

ORDERED that Motion of Defendant, Wachovia Bank, National Association, f/k/a First Union National Bank to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) is GRANTED. The Plaintiff's complaint is DISMISSED.

The Clerk is directed to forward a copy of this Order to Counsel.

Entered this 15th day of April, 2005.

s/ Gerald Bruce Lee
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
4/15/05

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED MARCH 6, 2006

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED March 6, 2006

No. 05-1536
CA-05-15-GBL-BRP

TRUMBALL INVESTMENTS LIMITED I; TRUMBALL INVESTMENTS LIMITED II; MOLINA INTERNATIONAL LIMITED; IVYWILD INVESTMENT CORPORATION; CORTLAND OVERSEAS LIMITED; TERREL OVERSEAS, INCORPORATED

Plaintiffs - Appellants

v.

WACHOVIA BANK, N.A.,
formerly known as First Union National Bank

Defendant - Appellee

On Petition for Rehearing En Banc

The appellant' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for rehearing en banc,

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IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge King, and Judge Shedd.

For the Court,

/s/ Patricia S. Connor
CLERK